Supreme Court, U.S.
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85-1861

No. _____

SUPREME COURT OF THE UNITED STATES

October Term, 1985

Amir Shokrian,
Petitioner,
vs.
Midge Carroll,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether petitioner's right to due process of law was denied where his plea of nolo contendere was accepted by the court without any inquiry as to the factual basis for the plea, and in the presence of special circumstances reflecting the petitioner's unwillingness to admit a factual basis?

Whether petitioner was denied due process of law where the State court failed to follow its own criminal procedures with regard to the establishment of a factual basis for a nolo contendere plea to a felony?

PARTIES TO THE PROCEEDING

There are no parties to this proceeding in addition to those set forth in the caption.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Amir Shokrian, respectfully prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Ninth Circuit which affirmed the judgment of the United States District Court, Central

District of California, dismissing Petitioner's Writ of Habeas Corpus.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is unpublished. The Memorandum Decision was filed on September 27, 1985. A petition for rehearing was thereafter filed on October 11, 1985. The petition for rehearing was denied on February 13, 1986.

JURISDICTION

Petitioner invokes the jurisdiction of this court under 28 U.S.C., Section 1254(1) on the grounds that he is a party to a Civil Case, for which review by way of Certiorari is authorized.

Jurisdiction of the United States District Court was invoked

under 28 U.S.C., Section 2254, their being a petition for writ of habeas corpus by a person in state custody.

The United States Court of Appeals for the Ninth Circuit filed its opinion of September 27, 1985, and thereafter denied petition for rehearing on February 13, 1986. The instant petition for Writ of Certiorari is filed within ninety days of denial of the petition for rehearing.

CONSTITUTIONAL PROVISIONS INVOLVED

"...nor shall any state deprive any person of life, liberty or property, without due process of law; ..." Amendment XIV, Section 1.

STATUTORY PROVISIONS INVOLVED

"Upon a plea of guilty or nolo contendere to an accusatory pleading charging

> a felony, ... [the] court shall ... cause an inquiry to be made of the defendant to satisfy itself that the plea is freely and voluntarily made, and that there is a factual basis for such plea."
>
> California Penal Code, Section 1192.5, in pertinent part. The complete text is forth in the Appendix.

STATEMENT OF THE CASE

Petitioner entered a plea of nolo contendere in the Los Angeles Municipal Court, State of California, to a charge of solicitation to commit murder on April 9, 1981. He was thereafter sentenced to ninety days in jail followed by three years and nine months of probation. Later, the

court revoked his probation and sentenced him to four years in prison. This Writ arises from petitioner's challenge to the constitutionality of the initial plea of nolo contendere entered by him to the underlying charges.

At the time the plea was entered the District Attorney conducted an interrogation of the petitioner. During the course of the interrogation no effort was made to induce petitioner to offer his rendition of the facts, nor was any reference made to a source extrinsic to the record from which the court might have discerned a factual basis for the plea. The record in fact shows that after the District Attorney explained the elements of the crime, petitioner was actually

prevented from making comment on the facts:

> "BY MR. HAYES [District Attorney]: Now, in order to prove this case, the people would have to prove beyond a reasonable doubt the you solicited someone to commit murder, ... that you had the specific intent ... to see that he was killed. Now, knowing that, do you wish to contest the charges against you?
>
> THE DEFENDANT: Well, I don't think that is -
>
> MR. MYHRVOLD [Petitioner's attorney] Just a minute.
>
> THE COURT: I think that the record should reflect, and the court will make a

finding, that Mr. Shokrian understands the charge in this case and understands that his plea of no contest means he is not contesting the charge."

Reporter's transcript of Plea Proceedings, April 9, 1981 (hereinafter "R.T.") at pp. 8-9.

The only reference to a factual basis for petitioner's plea came in the form of a stipulation between his attorney, Alvin Myhrvold, and the District Attorney:

"MR. HAYES: Will you stipulate further that there is a factual basis for the plea?

MR. MYHRVOLD: Yes."

R.T. p. 9, ll. 18-20.

Based upon this evidence alone the court found that there was factual basis for the plea. R.T. p. 10, ll. 21-22.

The crux of this case is that petitioner entered a plea of nolo contendere while believing himself to be innocent of the crime charged. There is no question that if Shokrian had been directly interrogated as to the factual basis for his plea, his statements to the court would have precluded his plea from being taken. The declaration of Mr. Shokrian, which was attached to the Traverse and Return to the Petition for Writ of Habeas Corpus filed in the District Court (hereinafter "Shokrian Declaration") indicates Mr. Shokrian's confusion as to what was in fact taking place at

the time of the entry of his plea:

> "During the taking of the plea of April 8, 1981, the District Attorney tried to explain the elements of the charge with which I was charged. I felt the facts did not square with his explanation and I began to state so. I wanted to tell the judge at this time that I had never in fact intended to cause my brother-in-law any harm, and that the police officer had coerced me into acting as I did. But before I could finish my sentence, my attorney, Mr. Myhrvold, interrupted me. When Mr. Myhrvold thereafter stipulated to a factual

basis, I did not understand what this meant, nor did I authorize him to do so."

Shokrian Declaration paragraph 8.

Thus, instead of an inquiry into factual basis taking place, the defendant merely stated on the record: "I do not wish to contest the elements." R.T. p. 9, l. 15. The only ground for finding a factual basis for the plea was Mr. Myhrvold's bare stipulation that there was a factual basis.

REASONS FOR GRANTING THE WRIT

This issue presented in this case, whether the failure on the part of a state court to establish factual basis on the record at the time of taking the felony plea constitutes a violation of due process, has not

been conclusively addressed or decided by this Court. This is an issue requiring the guidance of this court, and is of nationwide importance. Several circuits have reached this question, including the Ninth Circuit in the recent case of Rodriguez v. Ricketts, 777 F.2d (9th Cir. 1985) [holding that "the due process clause does not impose on a state court the duty to establish a factual basis for a guilty plea absent special circumstances"]. A definitive answer to the issue raised in this petition has yet to be provided by this Court, although, as is argued below, this Court's decisions point the way toward the position advanced herein.

In this case, the Ninth Circuit found that there was an

adequate factual basis for petitioner's plea. The court rationalized its decision as follows:

> "Here, the prosecutor explained the charges to appellant in open court. He told appellant that at trial the State would have to prove that appellant solicited the murder of his brother-in-law in Los Angeles County with the intent that he be killed. Appellant stated that he did not contest the charges.
>
> In addition to the statements made during the plea hearing, the record contained affidavits and other statements which described in detail

appellant's actions and statements relative to the solicitation of murder." Appendix, page __.

The Ninth Circuit opinion confuses the requirement of establishing factual basis with that of voluntariness. Although the factual basis determination is "part of the voluntariness determination," U.S. v. $31,697.59 Cash, 665 F.2d 903, 905-06 (9th Cir. 1982), the tests are distinct. Factual basis may not be established by a mere explanation of the element of the charges, as the prosecutor provided here. Rather, a finding of factual basis entails that the defendant be made aware of the relationship of the facts as he knows them to the elements of the crime. McCarthy v.

United States, 394 U.S. 459, 466 (1969). Here, the trial court's inquiry fell short of that necessary to establish factual basis on the record.

Without inquiry into the facts as the petitioner perceives them in order to ascertain whether such facts constitute the offense with which he is charged, any waiver of his constitutional rights becomes meaningless. The defendant may be made completely aware of his constitutional rights in the process of taking the plea. He may waive each and every one of those rights. He may be advised that his plea brings with it the possibilities of prison sentence and deportation. But if he is kept unaware as to whether his actions, in fact, constitute the

commission of the crime as charged, then it is impossible to say he in truth understood or volunteered the plea. Clearly, an ignorant failure to claim a right represents a nullification of the constitutional guarantee. It follows that a plea cannot be said to be voluntary for purposes of satisfying the due process requirement unless defendant is made aware that a factual basis exists for the plea. See The Supreme Court, 1968 Term, 83 Harv. L. Rev. 7, 184-85 (1969); Heberling, Judicial Review of the Guilty Plea, 7 Lincoln L. Rev. 137, 181-83 (1972).

Inquiry into the factual basis of a plea serves as an integral element in the court's voluntariness determination, McCarthy v. United States, supra, 394 U.S. at 465-67,

and also makes appellate review of a plea less complex by providing a more adequate record of the conviction process, 394 U.S. at 467. Factual basis inquiry also facilitates rehabilitation of the defendant, Santobello v. New York, 404 U.S. 257, 261 (1971), and provides the court with a better assessment of the defendant's competency in his willingness to plead guilty, ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Plea of Guilty (App. Draft 1968) page 33. Finally, factual basis inquiry also insures that the defendant will be advised of potential defenses, Carrion v. United States, 578 F.2d 176 (7th Cir. 1978), and provides protection for innocent defendants, McCarthy v. U.S., supra,

394 U.S. at 467.

Most important of all is the protection rationale for the factual basis inquiry. It is based on the assumption that innocent defendants will offer guilty pleas and these defendants can be protected only if factual basis is required before their pleas are accepted. J. Rawls, A Theory of Justice, page 85 (1971). Thus, the factual basis inquiry furthers what has been termed the central concern of any system of criminal justice, to make certain that innocent defendants are not convicted. H. Packard, The Limits of the Criminal Sanction, page 166 (1968). Not surprisingly most states require a factual determination as a part of their plea taking procedures. See, e.g., ARIZ. R.CRIM.

PRO., Section 17.2-4; N.C. GEN. STAT., Section 15a-1021 to 1026; OHIO REV. CODE ANN., Section 2937.02; and TEX. CRIM. PRO., Art 26.13.

In this case, the only grounds for factual basis was the stipulation of counsel, which was not joined on the record by the defendant. This stipulation effectively divorced the judge from any role in the factual basis procedure. The judge was left to depend on the unspoken conclusions of counsel regarding the relationship of the facts of the case and the elements of the charge. There was nothing on or off the record apart from the inner workings of counsel's thought processes, from which the court might have determined the existence of factual basis. The mere

stipulation of counsel cannot satisfy the factual basis inquiry requirement for, as this court has several times expressed, the plea process should be separated from judicial assumptions and must be based on the responses of the parties involved. McCarthy v. United States, supra, Boykin v. Alabama, 395 U.S. 238, 243-44 (1969).

The admonition of this Court in Escobedo v. Illinois, 378 U.S. 478, 490 (1964), is directly on point: "No system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights." 378 U.S. at 490. Petitioner submits the actions of the court and counsel to prevent a true factual basis inquiry

at the time of his plea fall within this admonition. The parameters of the due process requirement of factual basis applicable to the states should be defined by this court.

Petitioner further argues that his right to due process was denied by reason of the failure of the court to follow the criminal procedures of the State of California with regard to establishing factual basis at the time of the plea. Due process requires that the State follow its own criminal procedures and State statutes. Hicks v. Oklahoma, 447 U.S. 343 (1980), Hopt v. Utah, 110 U.S. 574 (1884).

Section 1192.5 of the California Penal Code requires that in approving a plea of nolo

contendere or guilty to a felony, the court must not only cause an inquiry to be made, but it shall also determine on the record that there is a factual basis for the plea. In the instant action, no such factual basis inquiry was made, and there is no other source on or off the record from which a factual basis for appellant's plea might have been discerned, other than the bare stipulation of counsel. Under California law, a proper factual basis inquiry is accomplished:

> "By having the accused describe the conduct that gave rise to the charge, or by making specific references to those portions of the grand jury transcript or preliminary hearing

transcript which provide a factual basis for the plea, or by eliciting information from defense attorney or the district attorney." People v. Watts, 67 Cal.App.3d 173, 179-80, 136 Cal.Rptr. 496, 500 (1978).

It is clear that the municipal court failed to follow the requirements of Penal Code, Section 1192.5, as interpreted by case law. This case is therefore analogous to one in which a federal court has failed to adhere to the provisions of Federal Rule of Criminal Procedure 11(f), requiring factual basis inquiry as part of the taking of a plea, and constitutes a per se due process violation of the minimum procedural standards set by the

state's penal laws.

WHEREFORE, petitioner requests that a Writ of Certiorari be granted as herein prayed for.

Dated: May 8, 1986

DON ERIK FRANZEN, ESQ.
RUBIN, EAGAN & FEDER
A Professional Corporation

By_____
Attorneys for Petitioner

No._____

SUPREME COURT OF THE UNITED STATES

October Term, 1985

Amir Shokrian,	)
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Petitioner,	)
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vs.	)
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Respondent.	)
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APPENDIX TO PETITION

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE, Page 1.

ORDER ADOPTING FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE, Page 13.

JUDGMENT, Page 15.

MEMORANDUM DECISION, NINTH CIRCUIT, Page 17.

CALIFORNIA PENAL CODE § 1192.5, VERBATIM, Page 37.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

AMIR SHOKRIAN, Petitioner, vs. MIDGE CARROLL and ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, JOHN VAN DE KAMP, Respondents.	No. CV84-1574-DWW(Mc) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE

This Report and Recommendation is filed pursuant to the provisions of 28 U.S.C. §636(b)(1)(B) and General Order No. 194 of the United States District Court for the Central District of California.

The petitioner, a state prisoner, has filed a Petition For Writ of Habeas Corpus. The Magistrate recommends that the petition be denied

for failure to exhaust state remedies.

STATEMENT OF FACTS

The petitioner was charged by complaint in the Los Angeles Municipal Court with solicitation to commit murder in violation of California Penal Code, Section 635f, subdivision (b). The victim named in the complaint was Itzhak Shabtai, the petitioner's brother-in-law. On April 8, 1981, after waiving preliminary hearing, the petitioner entered a plea of nolo contendere to the complaint. The matter was set down for sentencing in the Los Angeles Superior Court. After a diagnostic study, proceedings were suspended and the petitioner was placed on probation for four years on condition that he serve ninty days in jail. On March 23, 1983, the petitioner was found in violation of his probation and sentenced to serve

four years in the state prison.

The petitioner filed an appeal from the finding that he was in violation of probation and a petition for writ of habeas corpus in the California Court of Appeal. That court affirmed the conviction and denied the habeas petition. Thereafter, the petitioner filed a "Petition For Hearing On Writ Of Habeas Corpus" in the California Supreme Court. The California Supreme Court denied the petition.

PETITIONER'S CONTENTIONS

(1) The Stipulation Entered Into By The Petitioner's Counsel At The Time Of The Petitioner's Plea Was Insufficient To Satisfy The Constitutional Requirement Of A Factual

Basis For The Plea.

(2) The Petitioner's Right To Due Process Was Violated When The Petitioner Entered A Plea Without Establishing A Factual Basis Therefor In Violation Of California Penal Code Section 1192.5.

DISCUSSION

The question presented by this habeas corpus petition is whether the petitioner has exhausted state remedies. An application for a writ of habeas corpus by a state prisoner may not be granted by a federal court unless the petitioner has exhausted remedies available to him in the state courts. 28 U.S.C. §2254(b) (1966). The petitioner must thus demonstrate that he has taken his claim for post-conviction

relief to the highest state court in order to satisfy the exhaustion requirement. Carothers v. Rhay, 594 F.2d 225, 228 (9th Cir. 1979).

> If a state court denies a petition for post conviction relief on procedural grounds, the petitioner has not exhausted his state remedies. He can still use the proper procedure, thus giving the state court the first opportunity to rule on the merits of his federal claims. This is what 28 U.S.C. §2254(b) requires.

Harris v. Superior Court of the State of California for the County of Los Angeles, 500 F.2d 1124, 1126 (9th Cir. 1974), cert. denied sub nom California v. Harris, 420 U.S. 973 (1975).

A denial of a habeas petition by the California Supreme Court which includes an explicit statement that the denial is on procedural grounds or which includes a citation of authority which indicates that the petition was procedurally deficient is not deemed to exhaust state remedies because "the California Supreme Court has not been given the required fair opportunity to correct the [alleged] constitutional violation." Id., p. 1128.

The petitioner's "Petition For Hearing on Writ of Habeas Corpus" was denied by the California Supreme Court with the following statement and citations: "Petition for hearing denied. (See In re Dixon (1953) 41 Cal.2d 756, 759; In re Swain (1949) 34 Cal.2d 300, 304; People v. Watts (1977) 67 Cal.App.3d 173, 180; Ganyo v.

Municipal Court (1978) 80 Cal.App.3d 522, 531-532; People v. Ribero (1971) 4 Cal.3d 55, 63-65.)" (Respondent's Return, Exhibit B.) This court must determine whether that somewhat delphic pronouncement constitutes a denial on the merits or on procedural grounds.

All but one of the cases cited by the California Supreme Court indicate that the denial of the petitioner's petition for hearing was made on procedural grounds. The cited portion of People v. Ribero, supra, holds that a criminal defendant seeking to challenge the validity of his guilty plea on appeal must comply with the provisions of California Penal Code §1237.5. California Penal Code Section 1237.5 provides:

> No appeal shall be taken by defendant from a judgment of

conviction upon a plea of guilty or nolo contendere, or a revocation of probation following an admission of violation, except where:

(a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings; and

(b) The trial court has executed and filed a certificate of probable cause for such appeal with the county clerk.

The cited portion of In re Swain, supra, holds that a petitioner seeking a writ of habeas corpus in the

California courts must allege with particularity the facts upon which he would have the final judgment overturned and must further disclose his reasons for delay in the presentation of these facts. The cited portion of In re Dixon, supra, holds that habeas corpus cannot substitute for an appeal and that, in the absence of special circumstances constituting an excuse for failure to file an appeal, the writ will not lie where claimed errors could have been, but were not, raised on direct appeal. The cited portion of Ganyo, supra, holds that a criminal defendant challenging the validity of his guilty plea because of a lack of a determination of a factual basis for the plea must clearly and positively allege and show that the requirement was not in fact met at the time of the entry of the

plea.

One of the cases cited by the California Supreme Court appeals to relate to the merits of the petitioner's claims. The cited portion of Watts, supra, holds that a finding of a factual basis for a plea may be made by a trial court by the use of a number of methods. The trial court may ask that accused to describe the conduct which gave rise to the charge, or it may refer to a grand jury transcript or to a preliminary hearing transcript, or it may elicit information from the prosecutor or the defense attorney.

Upon an analysis of the cases cited by the California Supreme Court, it appears that the petitioner's petition for hearing in that court was denied, at least in part, on procedural grounds. The California Supreme Court

appears to have held that the petitioner failed to made an adequate showing in that court why he did not comply with the provisions of California Penal Code Section 1237.5 and why he did not promptly challenge the validity of his nolo contendere plea on direct appeal.

Moreover, the petitioner's failure to comply with California Penal Code §1237.5 and his further failure to file a prompt state appeal with respect to the validity of his plea may constitute a waiver of the claim under California law. Such a waiver may constitute an adequate state procedural ground which bars any further federal habeas review of the merits of his claim. See Carothers v. Rhay, supra, p. 228 citing Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2457, 53 L.Ed.2d 594 (1977).

CONCLUSION

For the reasons stated above, the Magistrate recommends that the court find that the petitioner is not entitled to a writ of habeas corpus. The petition should be dismissed without prejudice to the petitioner's right to file a petition after he has exhausted state remedies.

DATED: This 30th day of May, 1984.

JAMES W. McMAHON
United States Magistrate

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

AMIR SHOKRIAN, Petitioner, vs. MIDGE CARROLL and ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, JOHN VAN DE KAMP, Respondents.	No. CV84-1574-DWW(Mc) ORDER ADOPTING FINDINGS CONCLUSIONS, AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE

Pursuant to 28 U.S.C. §636(b)(1)(B), the court has reviewed the petition, all of the records and files herein, the attached Report and Recommendation of the United States Magistrate, and the petitioner's Objections to the Report and Recommendation, and concurs with and adopts the findings, conclusions, and recommendations of the Magistrate.

IT IS HEREBY ORDERED that judgment be entered dismissing the Petition For Writ of Habeas Corpus without prejudice to the petitioner's right to file a new action after petitioner has exhausted his state remedies.

IT IS FURTHER ORDERED that the Clerk shall serve copies of this Order, the Magistrate's Report and Recommendation, and the Judgment herein by United States mail on the petitioner and on the Attorney General of the State of California.

DATED: This 25th day of June, 1984.

DAVID W. WILLIAMS
United States District
Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

AMIR SHOKRIAN, Petitioner, vs. MIDGE CARROLL and ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, JOHN VAN DE KAMP, Respondents.	No. CV84-1574-DWW(Mc) J U D G M E N T

Pursuant to the order of the court adopting the findings, conclusions, and recommendations of the United States Magistrate,

IT IS ADJUDGED that the Petition for Writ of Habeas Corpus is dismissed without prejudice to the petitioner's right to file a new action after petitioner has exhausted his state remedies.

DATED: This 25th day of June, 1984.

DAVID W. WILLIAMS
United States District
Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AMIR SHOKRIAN, Plaintiff-Appellant, v. MIDGE CARROLL and ATTORNEY GENERAL CALIFORNIA, Defendants-Appellees.	CA No. 84-6260 DC No. CV 84-1574-DWW MEMORANDUM*
AMIR SHOKRIAN, Plaintiff-Appellant, v. MIDGE CARROLL, Defendant-Appellee.	CA No. 84-6599 DC No. CV 84-3032-PAR

Appeal from the United States District Court for the Central District of California

Hon. David W. Williams, District Judge, Presiding (#84-6260)

Hon. Pamela A. Rymer, District Judge, Presiding (#84-6599)

Argued and submitted August 6, 1985 at Pasadena, California

Before: SKOPIL and CANBY, Circuit Judges, and SOLOMON,** District Judge.

Amir Shokrian (appellant) entered a plea of nolo contendere in the Los Angeles County Court to a charge of solicitation to commit murder. He was sentenced to ninety days in jail followed by three years and nine months probation. Later, the court revoked his probation and sentenced him to four years imprisonment.

Appellant filed two separate petitions for writ of habeas corpus in the United States District Court for the Central District of California.

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21

**The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

In the first petition, appellant contended that his plea of nolo contendere in a state court proceeding was invalid because there was an inadequate factual basis to justify the court's acceptance of the plea. In the second petition, appellant contended that he was denied effective assistance of counsel during his probation revocation and sentencing hearings.

The district court dismissed both petitions. We affirm.

Facts

On December 1, 1980, in the Los Angeles County Court, appellant was charged with solicitation to commit murder, in violation of section 653f of the California Penal Code. The complaint named Itzhak Shabtai, appellant's brother-in-law, as the

intended victim. The complaint followed intense discord between the Shokrian and Shabtai families which resulted from appellant's estrangement from his wife.

On April 8, 1981, appellant, after he waived preliminary hearing, entered a plea of nolo contendere. During the plea hearing, the prosecutor informed appellant of his constitutional rights to a trial. Appellant waived those rights. The prosecutor then asked appellant if his plea was made freely and voluntarily, and appellant answered "Yes."

Then the following exchange took place:

Prosecutor: Now, in order to prove this case, the People would have to prove beyond a reasonable doubt that you solicited someone to commit murder, to kill Itzhak Shabtai, that you had the specific intent that Mr. Shabtai - in other words, solicitation

coupled with specific intent to see that he was killed.

Now, knowing that, do you wish to contest these charges against you?

Appellant: Well, I don't think that is --

Defense Counsel: Just a moment.

The Court: I think that the record should reflect, and the Court will make a finding, that Mr. Shokrian understands the charge in this case and understands that his plea of no contest means that he is not contesting the charge.

Prosecutor: I am explaining the elements of the charge.

The People would have to prove that there was a solicitation to kill Mr. Shabtai and that you had the specific intent that he be murdered.

Now, knowing the elements of the crime, do you wish to contest the elements?

Appellant: I do not wish to contest the elements.

The prosecutor and defense counsel then stipulated that there was a factual basis for appellant's plea of nolo contendere.

Section 1192.5 of the California Penal Code requires that before the court accepts a plea of guilty or nolo contendere, the court must satisfy itself that there is a factual basis for the plea. In accordance with that requirement, the court stated that it found appellant's waivers to be knowingly and voluntarily made, that there was a factual basis for the plea, and that appellant entered the plea freely. The court then accepted the plea.

On November 17, 1981, after a sentencing hearing at which appellant was represented by counsel, the court placed appellant on probation for four years on the condition that he spend ninety days in jail.

On February 23, 1983, Shabtai appeared before the court ex parte and

complained that appellant had uttered curses to him in Persian, their native language.

On March 23, 1983, the court held a probation revocation hearing and found that appellant had violated the terms of probation because he threatened Shabtai. The court revoked appellant's probation and sentenced him to four years in prison. Appellant was represented by counsel in these proceedings.

On May 10, 1983, appellant appealed from the order revoking his probation. In the California Court of Appeal, he asserted that the trial court abused its discretion when it revoked his probation and that he was denied effective assistance of counsel at the probation revocation hearing.

On October 11, 1983, appellant

filed a petition for writ of habeas corpus in the California Court of Appeal in which he asserted (1) that the lack of effective counsel violated his right to due process, (2) that Shabtai's ex parte appearance biased the proceedings, and (3) that the testimony of two prosecution witnesses who spoke in Persian was not accurately translated.

On January 30, 1984, the California Court of Appeal affirmed the order revoking probation and denied appellant's petition for writ of habeas corpus, but the appellate court remanded the case to the trial court to resentence appellant because the court made inappropriate comments at the beginning of the sentencing hearing.

Appellant did not move to withdraw

his original plea of nolo contendere either before or after his sentence, and he did not file a direct appeal. Nevertheless, on November 14, 1983, and prior to the California Court of Appeal's opinion, appellant filed a second habeas petition in that court in which he challenged the validity of his original plea.

An appellant may not appeal from a conviction on a plea of guilty or nolo contendere unless the trial court executes and files a certificate of probable cause. Cal. Penal Code section 1237.5.

On December 22, 1983, the California Court of Appeal denied the second habeas petition. On the same day, appellant petitioned the California Supreme Court for a "Hearing on Writ of Habeas Corpus"

regarding the validity of his original plea. On January 26, 1984, the California Supreme Court denied the petition.

On February 9, 1984, appellant petitioned the California Supreme Court for a hearing on the first habeas petition, which the California Court of Appeal denied on January 30, 1984. On March 14, 1984, the California Supreme court denied this petition.

On March 9, 1984, appellant filed a federal habeas petition in the United States District Court in which he challenged the validity of his original plea of nolo contendere. One week later, he filed a second petition in which he challenged the validity of his probation revocation proceeding.

The district court denied both petitions, and it also denied appellant's petitions for certificates of probable cause. Appellant then filed two notices of appeal. Under Rule 22(b) of the Federal Rules of Appellate Procedure, we construed the notices of appeal as requests for certificates of probable cause and have granted appellant's requests to appeal.

Validity of the Plea -- No. 84-6260

In accordance with Rule 22(b), the Supreme Court holding in In Re Burwell, 350 U.S. 521 (1956), and appellant's urgent request that we consider the merits of these appeals, we have carefully analyzed the facts and arguments in each appeal.

Appellant contends that his original plea is invalid because under section 1192.5 of the California Penal Code the stipulation entered into by appellant's attorney and the prosecutor does not provide an adequate factual basis for his plea. Appellant contends that he was denied due process during the plea hearing because the state failed to comply with its own procedure which requires a factual basis for the plea.

Under People v. Watts, 67 Cal.App.3d 173, 180, 136 Cal.Rptr. 496, 500-01 (1977), the trial court may use various methods to determine that there is a factual basis for the plea. In Watts, the sole reference to a factual basis for the guilty plea was defense counsel's statement that he discussed the elements of the

charge with the defendant and advised him of the consequences of the plea. The court held that this statement considered alone did not satisfy the factual basis requirement. The court affirmed the conviction on the ground that the grand jury transript, which was part of the record, contained ample information which supplied an adequate factual basis.

The court in Watts stated that under section 1192.5, the trial court may use many kinds of evidence to satisfy itself that there is a factual basis for the plea, including statements by the defendant or his counsel, depositions, and presentence investigation reports.

We find that there was an adequate factual basis for appellant's plea. Here, the prosecutor explained the

charges to appellant in open court. He told appellant that at trial the state would have to prove that appellant solicited the murder of his brother-in-law in Los Angeles County with the intent that he be killed. Appellant stated that he did not contest the charges.

In addition to the statements made during the plea hearing, the record contains affidavits and other statements which describe in detail appellant's actions and statements relative to the solicitation of murder.

Appellant further contends that his federal due process rights were violated because his plea was not knowing and voluntary. He asserts that when his attorney interrupted him during the exchange quoted earlier, he was about to deny that he intended to

cause harm to his brother-in-law.

Appellant overlooks the fact that after the interruption, the prosecutor again described the elements of the charge:

Prosecutor: I am explaining the elements of the charge.

The People would have to prove that there was a solicitation to kill Mr. Shabtai and that you had the specific intent that he be murdered.

Now, knowing the elements of the crime, do you wish to contest the elements?

Appellant: I do not wish to contest the elements.

Appellant also stated that he made the plea of nolo contendere freely and voluntarily and that no one threatened him or caused him to enter his plea.

The record is devoid of any evidence that appellant's plea was not knowingly and voluntarily made. On the contrary, it shows that the court

and the prosecutor, with great particularity, informed the appellant of the facts on which the court accepted the plea.

Probation Revocation -- No. 84-6599

Appellant contends that he was denied effective assistance of counsel during his probation revocation and sentencing hearings of March 23, 1983 and that Shabtai's earlier ex parte appearance biased the judge. Specifically, appellant contends that his attorney failed to interview appellant and other witnesses; failed to obtain discovery and to investigate the facts of the probation violation; failed to file a motion to disqualify the judge for bias; failed to object to the inaccurate translation of witness testimony; failed to adequately cross-examine witnesses;

and failed to present the defense that in the Persian culture the use of threats is common and is equivalent to abusive language.

The transcript of the March 23 hearings shows that whatever errors appellant's attorney made, if any, did not affect the judgment and did not render his assistance ineffective. The attorney thoroughly examined and cross-examined the witnesses and ably brought out discrepancies in the testimony of some of the prosecution witnesses.

The attorney's failure to challenge the interpreter's translation and raise the cultural defense was justified and did not prejudice applicant. Only two of the five prosecution witnesses testified in Persian. The three who testified

in English, including Shabtai, stated that they believed that appellant would carry out his threats to kill Shabtai and members of Shabtai's family. These three witnesses did not indicate, as appellant contends, that his threats were mere curses.

The attorney's failure to file a motion to disqualify the judge is also justified. The judge permitted Shabtain to appear ex parte only to determine whether a probation violation hearing was necessary, and there is no evidence that the ex parte appearance biased the judge. The record shows that the judge revoked appellant's probation solely on evidence presented at the March 23 hearings.

In Strickland v. Washington, ____ U.S. ____, 104 S. Ct. 2052, 2064

(1984), the Supreme Court of the United States stated that "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." The Court further stated that "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Id., 104 S. Ct. at 2067.

On July 6, 1984, appellant had a second sentencing hearing in accordance with the remand from the California Court of Appeal. After a hearing, he was again sentenced to four years in prison. Appellant does

not explain why the issue of the effectiveness of his counsel at the first hearing is not now moot.

In any event, appellant has not met his burden to show ineffective assistance of counsel, and his contention that the trial court improperly heard ex parte testimony has no merit. Our examination of the record shows that appellant was adequately represented and that he was afforded due process during the March 23 hearings. The district court properly denied appellant's petition for writ of habeas corpus.

The district court's orders denying both of appellant's habeas petitions are AFFIRMED.

§1192.5. Plea of Guilty May Specify Punishment - Acceptance by Prosecuting Attorney and Approval of Court.

Upon a plea of guilty or nolo contendere to an accusatory pleading charging a felony, other than a violation of subdivision (2) or (3) of Section 261, Section 264.1, Section 286 by force, violence, duress, menace or threat of great bodily harm, subdivision (b) of Section 288, Section 288a by force, violence, duress, menace or threat of great bodily harm, or Section 289, the plea may specify the punishment to the same extent as it may be specified by the jury on a plea of not guilty or fixed by the court on a plea of guilty, nolo contendere, or not guilty, and may specify the exercise by the court thereafter of other powers legally available to it.

Where such plea is accepted by the prosecuting attorney in open court and is approved by the court, the defendant, except

as otherwise provided in this section, cannot be sentenced on such plea to a punishment more severe than that specified in the plea and the court may not proceed as to such plea other than as specified in the plea.

If the court approves of the plea, it shall inform the defendant prior to the making of the plea that (1) its approval is not binding, (2) it may, at the time set for the hearing on the application for probation or pronouncement of judgment, withdraw its approval in the light of further consideration of the matter, and (3) in such case, the defendant shall be permitted to withdraw his plea if he desires to do so.. The court shall also cause an inquiry to be made of the defendant to satisfy itself that the plea is freely and voluntarily made, and that there is a factual basis for such plea.

If such plea is not accepted by the

prosecuting attorney and approved by the court, the plea shall be deemed withdrawn and the defendant may then enter such plea or pleas as would otherwise have been available.

If such plea is withdrawn or deemed withdrawn, it may not be received in evidence in any criminal, civil, or special action or proceeding of any nature, including proceedings before agencies, commissions, boards and tribunals.